

# Before The Board of Patent Appeals and Interferences

For:

**PROGRAM-UPDATE PRIORITIZATION ACCORDING TO  
PROGRAM-USAGE TRACKING**

Applicant: <b>James Russell CURTIS et al.</b>	Attorney Docket No.: <b>200314220-1</b>		
Serial No.: <b>10/691,028 (5010)</b>	Filed: <b>2003-Oct-22</b>	Art Unit: <b>2192</b>	Examiner: <b>DAO, Thuy Chan</b>

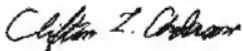
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## **Appeal Brief**

### **(Identification Page)**

This is an Appeal to the Board of Patent Appeals and Interferences from a Final Action dated 2009-Apr-16. A Notice of Appeal was submitted on 2009-Jul-15.

Respectfully submitted  
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 by




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## **REAL PARTY IN INTEREST**

The real parties in interest are

Hewlett-Packard Company, a Delaware corporation; and

Hewlett-Packard Development Company, L.P., a Texas limited partnership and wholly owned affiliate of Hewlett-Packard Company, and assignee of record.

## **RELATED APPEALS AND INTERFERENCES**

None.

There are no related appeals or interferences.

## **STATUS OF CLAIMS**

Claims 1, 3-6, and 8-10 are pending in the application.

Claims 2 and 7 have been canceled.

Claims 1, 3-6, and 8-10 are rejected.

The rejections of Claims 1, 3-6, and 8-10 are on appeal.

## **STATUS OF AMENDMENTS**

All amendments have been entered. There are no unentered amendments.

## SUMMARY OF CLAIMED SUBJECT MATTER

### Concise Explanation of Claims

Independent Claim 1 relates to a method (M1, Fig. 2, ¶¶19-24) comprising:

launching (S02, Fig. 2, ¶19) an application (20, Fig. 1, ¶¶16-18) on a user system (13, Fig. 1, ¶16);

tracking usage (S03, Fig. 2, ¶19) of said application so as to generate usage data (31, Fig. 1, ¶19) on said user system;

accessing (S04, Fig. 2, ¶20) an update site (11, Fig. 1, ¶16) from said user system;

transferring (S05, Fig. 2, ¶21) said usage data from said user system to said update site;

said update site prioritizing (S07, Fig. 2, ¶23) updates for said application at least in part as a function of said usage data; and

said update site presenting (S08, Fig. 2, ¶23) to a user a list of said updates as prioritized in said prioritizing step.

Claim 3 relates to a method as recited in Claim 1 wherein said user selects (S09, Fig. 2, ¶24) one or more of said updates for said application.

Claim 4 relates to a method as recited in Claim 3 wherein said selected ones of said updates are installed (S11, Fig. 2, ¶¶24-25) so as to modify said application.

Claim 5 relates to a method as recited in Claim 1 wherein further development of said application is directed (¶26) in part as a function of said usage data.

Independent Claim 6 relates to a computer program product (AP1, Fig. 1, ¶16) comprising computer-readable storage media encoded with a set of computer programs including:

a usage data evaluator (23, Fig. 1, ¶16) for receiving and evaluating raw usage data provided by a user computer system (13, Fig. 1, ¶16) regarding a version of a software application installed thereon, said usage data evaluator providing evaluated usage data;

an update prioritizer (25, Fig. 1, ¶16) for prioritizing updates available for said version at least in part as a function of said evaluated usage data; and

a web interface (21, Fig. 1, ¶16) for communicating with said user computer system via a browser on said user system so as to present to a user of said user computer system a list of said updates as prioritized by said prioritizer.

Claim 8 relates to a product as recited in Claim 6 wherein said web interface specifies, for at least some of said updates, advantages over said version of said application.

Claim 9 relates to a product as recited in Claim 6 further comprising a usage-tracking module (30, Fig. 1, ¶17) installed on said user computer system.

Claim 10 relates to a product as recited in Claim 9 wherein said usage-tracking module is integrated with said version of said application.

## **GROUNDS OF REJECTION TO BE REVIEWED**

All outstanding grounds of rejections are to be reviewed. These grounds are set forth below.

Claims 1, 3-6, and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Patent No. 2004/0003266 A1 to Moshir et al., "Moshir" herein, in view of US Patent No. 6,678,888 to Sakanishi, "Sakanishi" herein.

## ARGUMENTS

### [01] ARGUMENTS FOR REVERSING REJECTIONS FOR OBVIOUSNESS

[02] Item 7 of the Final Action of 2009-Apr-16 rejects Claims 1, 3-6, and 8-10 under 35 U.S.C. 103(a) as being unpatentable over Moshir in view of Sakanishi.

[03] For the purposes of these rejections, the rejected claims are divided into: Group 1 consisting of Claims 1 and 3-5; Group 2 consisting of Claim 5; and Group 3 consisting of Claims 6 and 8-10.

### [04] GROUP 1: CLAIMS 1, 3, and 4

[05] Item 7 of the Final Action rejects Claims 1, 3 and 4 for obviousness given Moshir in view of Sakanishi. These rejections should be reversed because of the following Examiner errors: 1) a failure to fully identify the differences between the claimed invention and the state of the art as required by *Graham v. John Deere*; 2) failure to accurately characterize the level of skill in the art as required by *Graham v. John Deere*; 3) a failure to provide a viable motivation for modifying Moshir in accordance with the teachings of Sakanishi; and 4) a failure to establish that the proposed combination would meet the claim limitations.

### [06] STATE OF THE ART

[07] The Final Action cites Moshir as representative of the state of the art. Moshir addresses a problem referred to as "administrator agony" by automating much of the updating process that system administrators previously managed manually. Moshir's teachings are toward less rather than more administrator involvement in updating target systems. User

involvement in such updating is even more limited, e.g., limited to identifying problems that might be addressed by an update.

[08] Claim 1 requires “said update site presenting to a user a list of said updates as prioritized in said prioritizing step”.

[09] The Final Action asserts that this limitation is disclosed at FIG. 6, block 706, [0144]-[0147]; FIG. 5, [0129], notification means 516, [0132]; [158] and [0187]). However, none of these sources in Moshir disclose this “presenting prioritized list” limitation.

[10] Moshir, Fig. 6, does not disclose “presenting”, does not disclose “prioritized” and does not disclose a “list”, and does not even include a “block 706”. If the Examiner intended to refer to Fig. 7 instead of Fig. 6, then Fig. 7 does include a block 706 labeled “proposed update list”. So, Fig. 7 discloses a list, but does not disclose that it is prioritized or that it is presented to a user. Paragraphs [0144]-[0147] teach that when list 706 is generated, an administrator is notified. However, Moshir does not teach that the list is presented to the administrator, let alone to a user. Also, Paragraphs [0144]-[0147] do not disclose that the list is prioritized.

[11] Moshir Fig. 5 discloses an update list 536, but does not disclose that it is prioritized or that it is presented to a user. Paragraph [0129] discloses a “list of agents”, but this is not a list of updates, is not disclosed to be prioritized, and is not disclosed to be presented to a user. Fig. 5 does disclose a notification means 516, but this is not a disclosure of a list of updates, a prioritized list, or presenting a list. Paragraph [0132] does not disclose a list, whether prioritized or not and whether or not presented to a user.

[12] Paragraph [0158] discloses presenting a report matrix to an administrator, but does not disclose a list, prioritized or not. Paragraph

[0187] does not disclose a list, whether prioritized or not and whether presented or not.

[13] Thus, an exhaustive search of the portions of Moshir relied on for a disclosure of a prioritized update list presented to a user demonstrates that the Examiner's characterization of the state of the art is in error. In fact, Moshir fails to disclose all the claim elements it is relied on to disclose. Accordingly, the rejection of Claim 1 should be reversed.

**[14] LEVEL OF SKILL IN THE ART**

[15] The Final Action relies on Sakanishi to represent the level of skill in the art. More specifically, the Final Action asserts that Sakanishi discloses the Claim 1 limitation "said update site prioritizing updates for said application at least in part as a function of said usage data". However, Sakanishi does not disclose this limitation.

[16] The Final Action asserts that Sakanishi discloses "usage data" at Fig. 3, and column 7, lines 23-40. While this figure and this passage do disclose software information, they do not disclose any information regarding a user's use of the software; in other words, no usage information is disclosed.

[17] Sakanishi, Fig. 12, and a passage extending from column 9, line 56 to column 10, line 10, also fail to disclose usage data. However, the passage does indicate that a user may enter "information specifying a priority level"; this suggests that update priorities are simply assigned rather than being generated as a function of usage data. (Sakanishi, Fig. 7 teaches Affected software as asserted in the Final Action, but does not teach usage data or prioritizing.)

[18] Referring to the Final Action on page 6, Sakanishi Fig. 12 does disclose that priority levels can be assigned to updates, but does not disclose that these priority levels are based on usage data. Sakanishi, column 5, lines 27-32 discusses priority levels, but does not disclose they are a function of usage data. Referring to the Final Action on page 7, Sakanishi, column 8, lines 16-28 discloses priority levels, but not that they are a function of usage data. Rather than disclose a prioritized list, Sakanishi discloses non-prioritized tables with columns under which priority levels can be specified.

[19] Thus, an exhaustive analysis of the portions of Sakanishi relied for a disclosure of the Claim 1 limitation "said update site prioritizing updates for said application at least in part as a function of said usage data" demonstrates that the Final Action has failed to establish that the limitation is disclosed by Sakanishi. **Thus, the Final Action has erred in characterizing the level of skill in the art; for this second reason, the rejection for obviousness of Claim 1 should be reversed.**

[20] **No Motivation to Combine**

[21] The Final Action, page 7, proposes as the motivation for modifying Moshir would be to "efficiently handle software distribution." However, it is apparent that the method disclosed by Moshir is already more efficient than the method disclosed by Sakanishi. Sakanishi requires a user to make requests and assign priority levels to those requests; Moshir imposes almost no burden on a user and imposes a greatly reduced burden on an administrator. Accordingly, one skilled in the art would not be motivated to modify Moshir in accordance with the teachings of Sakanishi due to the increased burden on a user. **Since one would not be motivated to**

**combine the references as proposed, the rejection for obviousness of Claim 1 should be reversed for this third reason.**

[22] **Proposed Combination does not meet claim limitations**

[23] The Final Action does not explain how Moshir is to be modified in accordance with the teachings of Sakanishi. Are Moshir's lists to be replaced by Sakanishi's tables? Are the tables to have Sakanishi's data in them or Morshir's. Is Moshir's user, who does not participate in the update process, supposed to be modified so that the user enters priority levels and makes update decisions? The Final Action leaves the reader with the challenge of figuring out the character of the proposed modification.

[24] However, whatever the character of the proposed combination, it appears that it would not meet all the limitations of Claim 1. Neither reference discloses prioritizing updates as a function of usage data. Moshir discloses prioritizing based on criticality; Sakanishi discloses assigning priority levels without specifying the basis for assigning the priority levels. Since neither reference discloses prioritizing updates based on usage, the proposed combination of references would also fail to meet the limitation of prioritizing updates as a function of usage. **Since the proposed combination of references, whatever its actual character, would not meet all the limitations of Claim 1, the rejection of Claim 1 for obviousness should be reversed for this fourth reason.**

[25] **Claims 3 and 4**

[26] The rejections of Claims 3 and 4 for obviousness should also be reversed based on their dependency from Claim 1.

[27] GROUP 2: Claim 5

[28] Item 7 of the Final Action rejects Claim 5 for obviousness given Moshir in view of Sakanishi. This rejection should be reversed because of the following Examiner errors: 1) a failure to fully identify the differences between the claimed invention and the state of the art as required by *Graham v. John Deere*; 2) a failure to accurately characterize the level of skill in the art as required by *Graham v. John Deere*; 3) a failure to provide a viable motivation for modifying Moshir in accordance with the teachings of Sakanishi; and 4) a failure to establish that the proposed combination would meet the claim limitations.

[29] The rejection of Claim 5 should be reversed for all the reasons given above for Claim 1, from which Claim 5 depends. Claim 5 adds the limitation "wherein further development of said application is directed in part as a function of said usage data.". The Final Action asserts that this limitation is disclosed somewhere in paragraphs [0065]-[0070], but a careful review of these paragraphs did not discover any teachings to this effect. **For this additional reason, the rejection of Claim 5 should be reversed.**

**[30] GROUP 3: Claims 6 and 8-10**

[31] Item 7 of the Final Action rejects Claims 6 and 8-10 for obviousness given Moshir in view of Sakanishi. These rejections should be reversed because of the following Examiner errors: 1) a failure to fully identify the differences between the claimed invention and the state of the art as required by *Graham v. John Deere*; 2) a failure to accurately characterize the level of skill in the art as required by *Graham v. John Deere*; 3) a failure to provide a viable motivation for modifying Moshir in accordance with the teachings of Sakanishi; and 4) a failure to establish that the proposed combination would meet the claim limitations.

**[32] STATE OF THE ART**

[33] The Final Action, page 8, cites Moshir as representative of the state of the art. Moshir addresses a problem referred to as “administrator agony” by automating much of the updating process that system administrators previously managed manually. Moshir’s teachings are toward less rather than more administrator involvement in updating target systems. User involvement in such updating is even more limited, e.g., limited to identifying problems that might be addressed by an update.

[34] The Final Action, page 8, asserts that Moshir discloses the Claim 6 limitation “*a usage data evaluator for receiving and evaluating raw usage data received provided by a user computer system* (e.g., [0010]-[0018]; FIG. 6, usage/software/hardware info 604-608, [0099]-[0100]);”. As to Moshir, [0010]-[0018], these paragraphs describe the administrator agony discussed above, but not a usage data evaluator. Also, paragraphs [0010]-[0018] are part of the background section of Moshir and are not directly related to the embodiment represented in Moshir, Fig. 6. Moshir Fig. 6 discloses “usage info 604”, but not a usage data evaluator. [0099] discloses a “discovery agent 548

that inventories usage info 604; however, Moshir does not disclose that discovery agent 548 evaluates usage info 604. [0100] does not address usage info 604 directly but does indicate that some information (that might include usage info 604) is sent and possibly compressed and encrypted. **None of the figures or passages relied on in the Final Action for a disclosure of a usage data evaluator actually discloses a usage data evaluator or that usage data is evaluated.**

[35] The Final Action, page 8, asserts that Moshir discloses the Claim 6 limitation of “*an update prioritizer for prioritizing updates available for said version* (e.g., [0149]-[0152], [0181]);”. Paragraphs [0149]-[0152] address “critical patches”. However, they do not disclose a prioritizer for prioritizing these critical patches. Paragraph [0149] mentions Microsoft, a company that identifies some of its patches as “critical”. There is no reason to believe that Moshir is doing more than relying on a software vendor’s own characterization of a patch or update as “critical”. There is no basis for assuming that Moshir requires a prioritizer to determine what updates are critical. In any event, Moshir does not disclose an update prioritizer. Likewise, while paragraph [0181] discusses “critical”, “high-priority”, and “security-related” patches, the further reference to “Microsoft” suggests that these characterizations are provided by Microsoft and that Moshir does not require a prioritizer to assign these characterizations. **Again, in any event, and contrary to the assertion in the Final Action, Moshir does not disclose an update prioritizer.**

[36] The Final Action, page 8, asserts that Moshir discloses the claim 6 limitation of “*a web interface for communicating with said user computer system via a browser on said user system as to present to a user of said computer system a list of said contents as prioritized by said prioritizer* (e.g., FIG. 6, block 706, [0144]-[0147]; FIG. 5, [0129], notification means 516,

[0132]; [158] and [0187].” Fig. 6 does not include a block 706, but Fig. 7 does. Block 706 of Fig. 7 is labeled “proposed update list”. However, Fig. 7 does not disclose that list 706 is prioritized. Paragraph [0144] discusses factors considered in generating list 706; however, usage data is not one of the factors and no mention is made of prioritizing list 706. Paragraphs [0145]-[0147] discuss how list 706 is used, but do not discuss factors involved in creating list 706 and do not disclose that it is prioritized. Fig. 5 discloses an update list 536, but does not disclose that it is prioritized. Paragraph [0129] discloses that an update server will make packages available one at a time; however, no relationship to a list is disclosed and there is no disclosure that the order is based on usage data. Paragraph [0132] mentions placing a location reference on a list, but not that the list is prioritized. Paragraph [0158] does not disclose a web interface, a list, or usage data. Paragraph [0187] discloses patches that do and do not meet a patch baseline policy; however, there is no mention of a list, a web interface, or user data. Thus, contrary to the assertion in the Office Action, the cited portions of Moshir do not disclose the Claim 6 limitation of a “a web interface for communicating with said user computer system via a browser on said user system as to present to a user of said computer system a list of said contents as prioritized by said prioritizer”.

[37] As demonstrated by the foregoing three paragraphs Moshir does not actually disclose the Claim 6 limitations the Final Action relies on Moshir to disclose. Accordingly, the Final Action has failed to identify accurately the distinctions between the claimed invention and the state of the art. Accordingly, the Final Action fails to meet the requirements of *Graham v. John Deere*, and the rejection of Claim 6 should be reversed for this first reason.

[38] LEVEL OF SKILL IN THE ART

[39] The Final Action recognizes that Moshir does not disclose “an update prioritizer for prioritizing updates available for said version at least in part as a function of said evaluated usage data”. The Final Action (bottom of page 9) asserts that Sakanishi discloses “*an update prioritizer for prioritizing updates available for said version at least in part as a function of said evaluated usage data* (e.g., FIG. 7 explicitly teaches Affected software.” As the Final Action asserts, Fig. 7 teaches “affected software”, which presumably relates to the claimed “version”. However, Fig. 7 does not disclose the prioritizer of Claim 6.

[40] The Final Action refers to Sakanishi, Fig. 12, an annotated version of which is presented on Page 9 of the Office Action. Fig. 12 discloses several tables, three of which include columns labeled “priority”, implying some prioritization has occurred. However, Fig. 12 does not disclose the claimed prioritizer. It is noted that the priorities may have been user assigned, in which case, Sakanishi would not need the claimed prioritizer. Also, Fig. 12 does not disclose that the prioritization is based on usage data as claimed.

[41] The Final Action, bottom of page 9, quotes Sakanishi, column 5, lines 27-32. This passage discusses comparing priority levels, but does not disclose a prioritizer or the use of usage data. The Final Action also quotes Sakanishi, column 8, lines 16-28. The passage reiterates that the tables of Fig. 6 include entries specifying priority levels. However, this passage does not disclose a prioritizer or usage data. Thus, Sakanishi does not disclose the claimed prioritizer and does not disclose that priorities are assigned as a function of usage data.

[42] The Final Action on page 8, asserts that Sakanishi discloses “*usage data* (e.g., FIG. 3, col.7: 23-40; FIG. 12, col.9: 56 - col. 10: 10);”. Fig. 3 discloses hardware data and software data, but no usage data. Sakanishi, column 7, lines 23-40, mentions “utilization of data” (line 39), but not usage data. Fig. 12 does not disclose usage data. Sakanishi, column 9, line 56 to column 10, line 10 discloses that a user may enter information specifying a priority level, but does not disclose usage data or that the priority level is a function of usage data. **Thus, the Final Action fails to establish that Sakanishi discloses usage data.**

[43] The Final Action, on page 10, asserts that Sakanishi discloses “*a web interface for communicating with said user computer system via a browser on said user system as to present to a user of said computer system a list of said contents as prioritized by said prioritizer* (e.g., FIG. 25-26, col.15: 32-64).” However these figures and the passage do not refer to a web interface. Also, while tables are disclosed, no list is disclosed. Also, usage data is not involved in these tables. **Since the Final Action fails to accurately characterize the level of skill in the art as required by Graham v. John Deere, the rejection of Claim 6 for obviousness should be reversed for this second reason.**

[44] LACK OF MOTIVATION

[45] The Final Action, page 10, proposes as the motivation for modifying Moshir would be to "efficiently handle software distribution." However, it is apparent that the method disclosed by Moshir is already more efficient than the method disclosed by Sakanishi. Sakanishi requires a user to make requests and assign priority levels to those requests; Moshir imposes almost no burden on a user and imposes a greatly reduced burden on an administrator. Accordingly, one skilled in the art would not be motivated to modify Moshir in accordance with the teachings of Sakanishi due to the increased burden on a user. **Since one would not be motivated to combine the references as proposed, the rejection for obviousness of Claim 6 should be reversed for this third reason.**

[46] FAILURE OF PROPOSED COMBINATION TO MEET CLAIM LIMITATIONS

[47] To the extent prioritization is disclosed or implied in the references it appears to be performed by a user (Sakanishi) or a Corporate Entity (e.g., Microsoft, as in Moshir). Neither a user nor a corporation would qualify as a program encoded in computer-readable media as required by Claim 6. Furthermore, neither reference discloses prioritization as a function of usage data as required by Claim 6. Thus, however Moshir is modified in accordance with the teachings of Sakanishi, the combination would not meet the claim requirements for a prioritizer that prioritizes on the basis of usage data. **Since the proposed combination of references would not meet all the claim limitations, the rejection for obviousness of Claim 6 should be rejected for this fourth reason.**

[48] **Claims 8-10**

[49] The rejections of Claims 8-10 should be reversed in view of their dependency from Claim 6.

## Claims Appendix

1. *(Previously presented)* A method comprising:
  - launching an application on a user system;
  - tracking usage of said application so as to generate usage data on said user system;
  - accessing an update site from said user system;
  - transferring said usage data from said user system to said update site;
  - said update site prioritizing updates for said application at least in part as a function of said usage data; and
  - said update site presenting to a user a list of said updates as prioritized in said prioritizing step.

2. *(canceled)*
3. *(Previously presented)* A method as recited in Claim 1 wherein said user selects one or more of said updates for said application.
4. *(original)* A method as recited in Claim 3 wherein said selected ones of said updates are installed so as to modify said application.

5. *(original)* A method as recited in Claim 1 wherein further development of said application is directed in part as a function of said usage data.

6. *(Previously presented)* A computer program product comprising computer-readable storage media encoded with a set of computer programs including:

a usage data evaluator for receiving and evaluating raw usage data provided by a user computer system regarding a version of a software application installed thereon, said usage data evaluator providing evaluated usage data;

an update prioritizer for prioritizing updates available for said version at least in part as a function of said evaluated usage data; and

a web interface for communicating with said user computer system via a browser on said user system so as to present to a user of said user computer system a list of said updates as prioritized by said prioritizer.

7. *(canceled)*

8. *(Previously presented)* A product as recited in Claim 6 wherein said web interface specifies, for at least some of said updates, advantages over said version of said application.

9. *(Previously presented)* A product as recited in Claim 6 further comprising a usage-tracking module installed on said user computer system.

10. *(Previously presented)* A product as recited in Claim 9 wherein said usage-tracking module is integrated with said version of said application.

## EVIDENCE APPENDIX

None. No evidence is submitted with this Appeal Brief.

## **RELATED PROCEEDINGS APPENDIX**

None. There are no related proceedings.